

REMARKS

This is in full and timely response to the above-identified Office Action. The above listing of the claims replaces all prior versions, and listings, of claims in the application. Reexamination and reconsideration in light of the proposed amendments and the following remarks are respectfully requested.

IDS/Reference Listing

The references listed in the specification that have not been previously listed and submitted in IDS form, are provided to supplement the disclosure and to merely provide examples of twist lock devices.

Drawings

It is again submitted that the movable and selectively positionable connection device of claim 12, is in fact illustrated – see element 300 in Fig. 3 and the disclosure carried in paragraph [0025]. See appendix A.

Claim Amendments

In this response, the claims have been amended to obviate the objections and rejections under 35 USC § 112, second paragraph, noted by the Examiner in paragraphs # 3-5 of this office action. For example, in claims 14 and 15, the expression “at least one adjacent container” has been changed to “at least one container which is disposed adjacent the shipping platform.” This finds exact antecedent basis in the last two lines of claim 13.

Claims 18 and 21 have been rewritten into independent form. Inasmuch as they have been indicated as containing allowable subject matter, these claims are now deemed to stand in *prima facie* condition for allowance.

Rejections under 35 USC § 103

- 1) The rejection of claims 1-3, 5-7 and 9-12 under 35 USC § 103(a) as being unpatentable over Betjemann in view of Glassmeyer, is respectfully traversed.

In order to establish a *prima facie* case of obviousness, it is necessary to show that the hypothetical person of ordinary skill would, without any knowledge of the claimed subject matter and without any inventive activity, be motivated to arrive at the

claimed subject matter given the guidance of the cited references when each is fully considered as statutorily required.

There are three possible sources for motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art. *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998) This case law, however, establishes that, even if the combination of the references may possibly teach every element of the claimed invention, without a motivation to combine, a rejection attempting to establish a *prima facie* case of obvious must be held improper. Additionally, the level of skill in the art cannot be relied upon to provide the suggestion to combine references. *AI-Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999).

In this rejection it is advanced that Betjemann discloses a shipping platform in Fig. 8 which is configured such that the spaces between the laterally opposite adjustable length pair of pillars at each end of the platform are open and free of structure which impedes passage of cargo therebetween. However, this is in error. Fig. 8 shows three gondolas with the removable end gates 29, 30, temporarily disconnected and aligned in "tandem" for the purposes of loading using means such as a fork lift – see column 5, lines 22-28. For disclosure of the end gates 29 and 30 - see column 4, line 71 – column 5, line 2. It is clear from the disclosure of Betjemann that the three gondolas shown in Fig. 8, will, when loading is completed, be separated and the end gates again secured in place.

Unlike the §102 statute wherein claims can be read on disclosed structure without regard as to the overall disclosure of a reference, the §103 statute requires that the disclosure of the document be taken as a whole. Thus, the fact that there are end gates and that they are temporarily removed to allow the end to end alignment of the platforms or gondolas, would not be ignored by the hypothetical person of ordinary skill. Suggestion of claimed requirements that call for the shipping platform to be configured such that spaces between the laterally extending upper-cross members and the platform are open and free of structure which impedes passage of cargo between the pairs of laterally opposed adjustable length pillars onto the platform, therefore cannot be distilled from Betjemann. In the end, the end gates 29 and 30 in Betjemann, will be put back in place and the ends will be closed off. Suggestion of the claimed structure is therefore not present.

In connection with claim 3, it is stated that the underside cross-members of Betjemann are "engageable" with "connection rails" which are used to interconnect the containers. This use of the "connection rails", however, seems to premature. That is to say, the rejection of claim 4 would seem to suggest that a further reference is necessary before "connection rails" can be rejected. Therefore, unless it can be shown that there is some suggestion of "connection rails" in Betjemann (without the citation of Sain), the rejection of this claim, at least, is submitted to be untenable.

Indeed, if claims 3 and 4 are not allowed in response to this submission, then it will be necessary to issue a further office action to clarify the PTO's position with respect to how the subject matter of claims 3 and 4 can be properly rejected in the manner found in this Office Action.

The rejection of claim 5 suffers from the problem discussed above. While there are apertures which are disclosed for use with twist lock devices, there is neither disclosure nor suggestion in either of the Betjemann or Glassmeyer references which suggest the use of "connection rails" therewith. In fact, there is suggestion that the twist locks are merely used to achieve a conventional direct container-container type connection – see column 4, lines 34-44 of Betjemann. This suggestion would seem to hinder any consideration of these openings being used for twist lock connections with "connection rails" in place of directly to another gondola.

In connection with claim 6, it is suggested that the platform (gondola) which is disclosed in Betjemann, is adapted for "oversized cargo." This position is submitted as being incorrect and is traversed. The overall tenor of the Betjemann reference is that relatively small cargo is carried – see column 2, lines 15-26 and in particular, column 4, lines 3-14. This quoted disclosure would have to be seen as suggesting "undersized cargo" rather than the reverse.

In connection with claim 17, it is submitted that the position that the adjustable length pillars are located "inboard" of the longitudinally opposed ends of the platform, is not well taken. In Betjemann, the pillars are located at the very ends of the platform. They are flush with the ends and therefore not "inboard" of the ends. It is again submitted that this rejection is made under § 103 and cannot be based on a § 102 type claim "reading" which is taken without regard to what the hypothetical person of ordinary skill would understand the disclosure and drawings of Betjemann to actually disclose.

In connection with the subject matter of claim 19, it is submitted that the spaces in between the pillars of the gondolas disclosed in Betjemann, are only open when the end gates are removed. It also must be noted that, when the end gates are removed, there are no upper cross members because these are part of the end gates and are, of course, removed with the gates.

Thus, this space cannot meet the requirement that the spaces between the laterally extending upper-cross members and the platform are constantly open and free of structure which impedes passage of cargo between the pairs of laterally opposed adjustable length pillars onto the platform – because when the end gates are removed, the structure which is being taken in this rejection to be the upper-cross member, is no longer there.

In this rejection, it is acknowledged that Betjemann lacks laterally extending upper cross-members that are respectively movable with the upper ends of the laterally opposed pair of adjustable length pillars, when the pillars are adjusted in length. To overcome this admitted shortcoming, Glassmeyer is cited as showing adjustable pillars each having an upper cross-member 48, 50, 72 interconnecting the upper ends thereof.

The rejection then advances the argument that it would have been obvious to one of ordinary skill in the art at the time the invention was made, to have provided upper cross-members as taught by Glassmeyer, to interconnect the upper ends of the telescopic members of Betjemann, because this would “provide additional strength and rigidity to the pillars as they move.”

The rejection is untenable in that, as noted above, the cross-members which the rejection seeks to render movable via the application of teachings from Glassmeyer, are in fact part of removable end gates, which must therefore be removable in order for the disclosed loading features of Betjemann to be rendered possible. That is to say, the end gates must be removed (thus removing the cross-member) in order to enable the alignment of a number gondolas in the manner illustrated in Fig. 8 of Betjemann.

The rejection also fails to provide any reason that can be extracted from the disclosure of the references or from that which is known to the person skilled in the art, that would suggest to “provide additional strength and rigidity to the pillars as they move.” This is nothing more than conjecture and nothing is presented in the rejection to substantiate the same.

The fact that the Glassmeyer references shows a structure is not reason to assume that the hypothetical person of ordinary skill would, for no given reason, consider the arrangement disclosed in Betjemann to be defective (for its disclosed purpose) to the degree that a transfer of teachings would be considered/implemented. Indeed, the stubby construction of the adjustment sections 23B and the short distance they extend above the level of the end gates, which provide a reinforcing lateral extending cross-member, conveys an impression that interconnecting beams for the sake of reinforcement would not be necessary.

Column 4, lines 44-57 of Betjemann, disclose that the purpose of these extensions is to ensure that the goods on the platform are always below the tops of the posts. There is no specific disclosure of using these as load bearing members which allow other gondolas to be placed on top of one another. Column 2, lines 37-40 of Betjemann also provides disclosure that these extensions are provided to enable the dimensions of the gondola to be conformed to that of the cargo elements cradled therein.

↓ A further feature of Betjemann is that the gondola is constructed to be light as practical – note the disclosure in column 4, lines 25 – 33, wherein the use of a light weight sandwich construction for the floor of the gondola wherein a honeycomb core is filled with a rigid foam plastic laminated between two facing sheets of steel or aluminum, is disclosed.

In light of this disclosure, adding weight increasing cross beams to provide an undisclosed need for additional rigidity would not seem to be high on the list of things that need to be done. Indeed, the intention of using helicopters (flying cranes) to move the gondolas in Betjemann must be contrasted with the obviously heavier, more robust construction found in Glassmeyer. The heavier the gondola the less the cargo that can be air lifted. The limits of the lifting ability of flying cranes (compared with dock cranes) is known and the need to efficiently transport as much cargo per gondola is an obvious paramount. Therefore, the gondola of Betjemann is designed the way it is for a good reason. The lighter the gondola, the greater the weight of cargo that can be transported per flight. Adding extra structure would add an unnecessary weight penalty and would not be desired. A lack of rigidity is neither disclosed nor suggested in Betjemann and therefore additional structures would not, for at least the reasons advanced above, be added without a sound reason to do so.

The tenor of Betjemann when taken as a whole, is toward light weight structures. Indeed, even the weight of a flatrack container such as disclosed in Glassmeyer must be kept within reasonable limits and the addition of every beam tends to increase the weight of the empty platform to the degree that care must be exercised to avoid the platform becoming so heavy that the combined weight of the platform and the cargo reaches a point where lifting it is rendered difficult.

It is submitted that the complexity of Glassmeyer contributes to its weight. The manner in which the front and rear bulkheads of Glassmeyer are constructed will increase the number of parts and the total weight of the flatrack container. This ruggedness of this construction is, however, an obvious necessity due to the intention of using the bulkheads as part of a ramp arrangement (see Fig. 5) wherein the bulkheads are pivoted to a horizontal position.

It is submitted that Betjemann and Glassmeyer are sufficiently different as to be non-analogous prior art. The two arrangements can be likened to a wicker basket and a steel tool box. For this reason it is held that the hypothetical person of ordinary skill would not be inclined to consider the Glassmeyer reference in light of the light weight requirements of Betjemann.

More specifically, two criteria have evolved for determining whether prior art is analogous or not. The first of these criteria is whether the art is from the same field of endeavor, regardless of the problem that addressed. The second of the two criteria is, if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent of the particular problem with which the inventor is involved. *In re Deminski*, 796 F.2d 436, 442, 230 USPQ 313, 315 (Fed.Cir. 1986); *In re Wood* 599 F.2d 1032, 1036, 202 USPQ 171, 174 (CCPA 1979).

Inasmuch as both references are directed to transport platforms, the first criteria would seem to be met. However, Glassmeyer is not at all directed to the problem or object of Betjemann of providing a gondola arrangement which can be air lifted using flying cranes. Accordingly, the second criteria is not met. Therefore, it can be concluded that Glassmeyer is non-analogous and should be withdrawn.

- 2) The rejection of claim 4 under 35 USC § 103(a) as being unpatentable over Betjemann "as modified" and as applied to "claim 3", and further in view of Sain, is respectfully traversed.

First, it is not clear what the "modified" recited in this rejection means. It would seem that this rejection should also recite the Glassmeyer reference, otherwise there would appear to be no "modification" possible. If this is not the case, then the modification which is being referred to, should be set forth in clear and concise terms (in a further office action) so that the prosecution record in is both clear and distinct and an intelligent response can be made thereto.

The traverse is additionally made on the basis that claim 4 requires the presence of containers that are disposed beside the open transport platform. Viz., claim 4 calls for an arrangement "wherein the connection rails engage the containers in a side-by-side configuration." A careful reading of the rejection would seem to indicated that the recited "platforms" are being mistakenly equated with the recited "containers."

As noted above, it appears that if the Sain reference is to be applied against the claimed subject matter, it would have to be introduced in connection with claim 3 rather than claim 4. That is to say, claim 4 depends from claim 3, and claim 3 introduces the connection rails.

This traverse is additionally made on the basis of Betjemann failing to disclose adjustable length pillars each having cross-members interconnecting the upper ends thereof in the manner apparently envisaged in this rejection. It is submitted that this rejection also fails to appreciate, as noted above, that the horizontally extending members are part of end gates 29 and 30 that are rectangular frames and which are bolted into the ends of the gondolas. This means that the limitations of claim 1, which inherently included in claim 4, and which require the ends of the platforms to be open, cannot be met except when the gondolas are in a partially dissembled state. Therefore, whether the connecting rails of Sain are used or not, is irrelevant to a *prima facie* case of obviousness being established.

- 3) The rejection of claims 13-16, 20 and 22 under 35 USC § 103(a) as being unpatentable over Betjemann in view of Glassmeyer and Sain, is respectfully traversed.

This rejection is traversed inasmuch as the structure of the Betjemann gondolas has been misunderstood as noted above, and the transfer of teachings between Betjemann and Glassmeyer has been proposed based on conjecture rather than teachings which are either found in the art of record, or are part of the knowledge which is attributed to the hypothetical person of ordinary skill. For example, the ends of the

gondolas of Betjemann are not open. They are normally closed by the rectangular end gates 29, 30, and only open when the gondolas are partially dissembled. Clearly, the requirement in claim 22 (for example) which calls for the ends to be "constantly" open can neither be met nor rendered obvious by this arrangement.

Betjemann has stubby posts which can be raised if required and are such that interconnecting them probably would not increase the rigidity of the arrangements (especially when the end gates are in place) to the degree that such a connection would be considered. Further, the provision of a cross-member would more than likely interfere with the intention of being able to drive a fork lift along an aligned series of gondolas such as shown in Fig. 8.

The Glassmeyer arrangement is such that the pivotal bulkheads, which are provide at either end of the platform, normally close the ends, and inasmuch as these bulkheads are intended to pivot down and become ramps, there is no reason for the ends of the platform to be open and in fact due to their intended ramp function the bulkheads would not be expected to be provided with apertures of any particular size. The teachings of this reference would therefore lead toward closing/blocking the ends of a platform rather than the reverse.

There is, therefore, absolutely nothing in the Betjemann and Glassmeyer references which would suggested that part of the rectangular structure of Betjemann should be revised to that part thereof can be raised and lowered in the manner found in connection with the header 72 found in the Glassmeyer arrangement. In connection with this position, the applicant calls attention to *In re Keller* (642 F.2d 413, 208 USPQ 871 (CCPA 1981)) which establishes that:

"the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference, nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art."

The teachings of Sain do not resolve these dilemma and therefore provides nothing that might assist in the formation of a *prima facie* case of obviousness.

Conclusion

It is respectfully submitted that the claims contain subject matter which is both novel and non-obvious over the art of record. Favorable consideration and allowance of this application is therefore courteously solicited.

Respectfully submitted,

By

Keith J. Townsend  
Registration No. 40,358

Date December 15, 2004

FOLEY & LARDNER LLP  
Customer Number: 22428  
Telephone: (202) 672-5327  
Facsimile: (202) 672-5399

APPENDIX A

